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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of

Reexamination of the Comparative
Standards of Noncommercial
Educational Applicants

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MM Docket No. 95-31

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FEDERAL COMMUNICATIONS COMMISSION
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To: The Commission

REPLY COMMENTS OF
NONCOMMERCIAL EDUCATIONAL BROADCAST LICENSEES

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To: The Commission

**JOINT REPLY COMMENTS OF
NONCOMMERCIAL EDUCATIONAL BROADCAST LICENSEES**

Alaska Public Telecommunications, Inc. ("APTI"), Arizona Board of Regents for Benefit of the University of Arizona ("Arizona), Arkansas Educational Television Commission ("AETC"), Board of Regents of Southeast Missouri State University ("SEMO"), Board of Regents of the University of New Mexico and the Board of Education of the City of Albuquerque ("KNME"), Board of Regents of the University of Wisconsin System ("UWS"), Boise State University ("BSU"), Central Michigan University ("CMU"), Greater Washington Educational Telecommunications Association, Inc. ("GWETA"), Iowa Public Broadcasting Board ("IPPB"), Iowa State University of Science and Technology ("ISU"), KCTS Television ("KCTS"), Kent State University ("KSU"), Maine Public Broadcasting Corporation ("MPBC"), Nashville Public Radio ("Nashville), The Ohio State University ("OSU"), Ohio University ("OU"), Regents of the University of New Mexico ("UNM"), Rocky Mountain Public Broadcasting Network, Inc. ("RMPBN"), San Diego State University ("SDSU"), Spring Hill College ("WHIL"), South Carolina Educational Television Commission ("SCETV"), St. Louis Regional Educational and Public Television Commission ("KETC"), State of Wisconsin -

Educational Communications Board ("WECB"), University of Minnesota ("U of M"), Virginia Tech Foundation ("VTF"), WAMC, Washington State University ("WSU"), WSKG Public Telecommunications Council ("WSKG") (collectively, the "NCE Broadcasters"), by their counsel, submit these joint reply comments in response to the Commission's *Further Notice of Proposed Rulemaking* in MM Docket No. 95-31 ("*NPRM*"), which, among other things, sought additional comment on the process used to award spectrum sought by NCE applicants.

INTRODUCTION AND SUMMARY

NCE Spectrum. Based on review of the comments in this proceeding and a series of detailed discussions with others in the public broadcasting industry, the NCE Broadcasters remain firmly convinced that a properly crafted point system -- based on the point system proposed by National Public Radio, Inc. (NPR), the Association of America's Public Television Stations (APTS) and the Corporation for Public Broadcasting (CPB) and coupled with swift FCC action on deficient or abusive applications -- represents the best, most workable method of selecting the most preferred NCE applicant without unduly taxing Commission resources or those of the applicants. The NCE Broadcasters will work with other public broadcasters on crafting an appropriate legislative solution that will give statutory authority to the Commission to delegate administration of a point system to staff in the Mass Media Bureau.

The NCE Broadcasters are submitting these reply comments to demonstrate support of the NPR/APTS/CPB point system, to suggest some slight refinements, and to address some efficient, practical ways to implement the point system and ensure smooth functioning while minimizing Commission staff resources.

NCE Applicants for Unreserved Spectrum. The NCE Broadcasters also urge the Commission to adopt their proposed "need-based" approach to the dilemma of "how to decide" among competing NCE and commercial applications for unreserved spectrum. The Commission is prohibited by the statutory language of Section 308(j)(2)(C) of the Communications Act of 1934, as amended, from conducting an initial auction if an NCE applicant has applied for an unreserved frequency. Still, the Commission must find a workable solution; the NCE Broadcasters believe their method is preferable, as it recognizes the real "need" for additional NCE stations outside of reserved spectrum without jeopardizing the efficient functioning of the auction process.

ARGUMENT

A. A Properly Crafted Point System will Select the Most Preferred Applicant

The vast majority of commenters supported a variation of the point system for decisions among mutually exclusive applicants for NCE spectrum.^{1/} While the point system presents the best method, it will only work if it is properly crafted and applied.

For the reasons given previously by the NCE Broadcasters, as well as the reasons given in the initial and reply comments of NPR/APTS/CPB and West Coast Public Radio, a point system that favors local applicants, local directors and officers, local funding, established local

^{1/} The NCE Broadcasters note that the commenters supporting a lottery have on file an unusually large number of applications for new radio or TV stations nationwide and would be greatly advantaged by use of some sort of lottery. The Commission should compare the Comments of Educational Media Foundation and Pensacola Christian College with the statistics set forth in the Station Resource Group Comments. In addition, the Comments of Kaleidoscope Foundation, which supported a lottery, reflect that it has filed applications on a "nationwide basis" in that its applications are for new noncommercial television stations in a variety of states -- no public broadcaster files applications nationwide.

educational presences, representative governing boards, diversity of ownership (nationwide), fair distribution of service and materially greater technical proposals, would select the most-preferred applicant. The point system initially proposed by the Commission, while commendable, suffers from insurmountable difficulties and cannot be applied without drastic harm to public broadcasting growth and expansion. Any point system needs to account for (i) statewide plans for public broadcasting service; (ii) the congressional mandate of Section 396 of the Communications Act of 1934, as amended; (iii) the use of regional networks and satellite/repeater stations to extend public broadcasting service to unserved areas (which has been encouraged by the federal government under funding programs administered by CPB and the Public Telecommunications Facilities Program of NTIA because it is an effective, cost-efficient way to extend service); and (iv) multiple program services in public broadcasting (i.e., news and information, classical music, jazz/world music, etc.).

The NCE Broadcasters's proposed point system is slightly different from that of NPR/APTS/CPB. For example, The NCE Broadcasters's definition of "local" specifically includes regional networks in its definition of "local." The NCE Broadcasters also advocate that a larger number of points should be awarded for first and second public radio service to a significant population, under the fair distribution of service criteria -- the NCE Broadcasters believe that extension of service to unserved or underserved areas is one of the most important goals in this proceeding and should be reflected by a much higher number of points. The NCE Broadcasters also believe that demerit points should be awarded to applicants who already have a significant share of the NCE spectrum nationwide (more than 25 stations and 50 stations, respectively). Still, the NCE Broadcasters believe that such demerits are not appropriate for state

or regional public broadcasting networks that are attempting to provide service throughout a state or region.

The NCE Broadcasters also believe that the current FM translator processing priorities, if applied consistently and timely with the displacement priority previously suggested, could be used to decide among competing FM and TV translator applicants -- there is no need to use the point system for those secondary translator services.

In addition, the NCE Broadcasters believe that any point system cannot intrude into content-based review. Thus, while the NCE Broadcasters support the concept of the National Federation of Community Broadcasters (NFCB) and other commenters views that local programming should be preferred, the Commission cannot, and should not, be engaging in comparisons of programming proposals. Instead, the Commission should look at the objective, substantive factors that support local programming -- these are the factors that are manifest in the NPR/APTS/CPB point system.

B. Practical Application of the Point System

The NCE Broadcasters believe that a well-crafted point system, applied consistently and swiftly, will decrease the need for the FCC to spend scarce resources on resolution of NCE mutually exclusive applications. Based on their own experience and the extensive data set forth in the filing of the Station Resource Group, Inc., the NCE Broadcasters have come to believe that the current A/B cutoff filing system is being abused by some applicants that file dozens of applications nationwide, often in reaction to an application -- particularly a perceived competitor's application -- that appears on an A cutoff list.

Documentation. Based on the Commission's experience with the point system for ITFS applications, the NCE Broadcasters do not believe that there will be many instances involving disputes about "points" awarded, if the point system is clearly and consistently applied.

Still, the NCE Broadcasters are aware that the Commission is moving away from extensive application documentation and moving towards more simple, "certification"-type, electronically filed applications. For a number of reasons, applications for NCE spectrum should not be subject to wholesale "certification" simplification. Most importantly, "certification" type filings severely limit the ability of a petitioner to challenge the qualifications of an applicant. Given the scarcity of reserved educational spectrum and the stringent qualification tests for its appropriate use, challengers must have access to complete information about an applicant. The Commission should require NCE applicants to "put their cards on the table."

The best way to ensure access to applicant information is to require applicants to make disclosures as part of the filing process. The Commission staff can rely on the certification check boxes for its review -- it need not parse through these disclosures, but it should require such disclosures so that other interested parties may comment. Thus, there are ways of reducing the burden on Commission staff of sifting through extensive documentation, while retaining the ability of MXed applicants and the public to comment on applications so that abusive and speculative applications that do not comply with existing application requirements and Commission rules can be weeded out.

For example, the NCE Broadcasters suggested in initial comments that certain documentation supporting an applicant's "points" should be made available to competing applicants after the mutual exclusivity among the applicants is discovered. After careful

consideration, the NCE Broadcasters now believe that this documentation should be provided to competing applicants, with a copy to the Commission. This will ensure that competing applicants, and the public, have access to the information underlying claimed "points." Thus, for example, the Commission could specify a 45-day or 60-day period for filing Petitions to Deny against an application. An applicant would then be required to file its documentation with the Commission and serve it upon competing applicants within 15 days after Public Notice.

This documentation requirement is similar, but less onerous than, the "Standard Document Production Request" used by Administrative Law Judges in comparative hearings to ensure that each side had access to appropriate information underlying the other side's application.

Holding Periods. After careful review and consideration of the comments, the NCE Broadcasters still believe that application of an appropriate point system eliminates the need for a holding period or limitations on the amount that may be gained in a transfer or assignment of an NCE station. The purpose of the holding period is to ensure that applicants do not "traffic" in permits for NCE stations by "feigning" qualifications. The NCE Broadcasters believe that an appropriate point system will already ensure that. Moreover, historically, noncommercial educational broadcast stations do not change hands often, absent the merger of public broadcasting entities or the financial distress of a station -- the vast majority of noncommercial broadcasters have strong mission-oriented reasons for operating and are not easily persuaded to abandon those missions. The Commission is wrong to assume that a point system will change these behavior patterns. There is no reason to believe that holding periods are necessary for an NCE point system to function properly. The Commission did not impose a holding period on

ITFS licensee chosen under a point system -- there is no good basis for treating NCE licenses differently.

In addition, the NCE Broadcasters believe that a holding period is impractical, and will only increase burdens on FCC staff without a countervailing benefit to applicants or the public. Any holding period must account for changed circumstances that would justify a license transfer -- a long holding period would only result in frequent exceptions or waivers, based on such changed circumstances, that would require individualized Commission staff resources and delay license transfers. Moreover, any holding period that contained a limitation on recoupment of legitimate and prudent expenses would force the Commission staff into making detailed judgment calls about the types of justifiable expenditures over years of noncommercial broadcast station operations, such as director and staff compensation, capital costs of equipment amortized over time, programming costs, the costs of paying back grants (such as federal NTIA grants, in which the government retains a 10-year federal interest in broadcast equipment), appropriate treatment of CPB grant funds, and other budgeted items. To spend Commission staff resources making determinations on what constitutes (or will not constitute) recoupment of reasonable and prudent expenses over a seven-year operating period would be difficult, time-consuming, and unnecessary.

Still, if the Commission determines that some sort of holding period is appropriate, the NCE Broadcasters urge that the holding period be only a very limited duration, such as one year after initiation of program tests (the standard used in Section 73.3597 of the Commission's Rules.) This one-year period, coupled with the new three-year construction period, would provide a sufficient holding period. At one time, the Commission used much longer holding

periods to restrict transfers of broadcast stations, but shortened those periods to the one-year set forth in Section 73.3597. The same reasons that caused the Commission to shorten holding periods for all broadcast stations should cause it to adopt a shorter holding period now, if it adopts one at all.

Moreover, use of a longer holding period could unfairly restrict the alienability of a noncommercial broadcast station without a countervailing benefit to the public. Any holding period would need to provide exceptions for certain changed circumstances, such as mergers or consolidations of public broadcast stations in a state or region. This is particularly important because increased media competition, decreasing federal, state and institutional support, DTV conversion costs (and the prospects of digital radio conversion) could all force consolidation in the public broadcasting industry -- a long holding period could artificially restrict helpful and necessary consolidation of the industry. If the Commission must adopt a holding period, it should ensure that there is a timely "out" for public broadcasting stations contemplating consolidation.

Oversight. Finally, the Commission should make every attempt to limit post-grant oversight of noncommercial educational stations acquired by applicant of the point system, if the NPR/APTS/CPB point system is adopted. The Commission should expend its energy to ensure that the most-preferred applicant is chosen, not engage in post-grant regulation that is difficult to enforce.

C. A Need-Based Determination is the Best Solution for Noncommercial Applicants Competing with Commercial Applicants For Unreserved Spectrum

The majority of comments in this proceeding that addressed the issue of auctions for unreserved spectrum were filed by noncommercial broadcasters. Only three commercial broadcasters filed comments -- each of those commercial broadcasters is competing with a noncommercial applicant for an unreserved channel and, predictably, advocates an auction that serves their own interests. Still, even one of the commercial broadcasters recognized that some additional "need-based" flexibility is appropriate at the rulemaking stage.^{2/}

While the proposed solutions offered by noncommercial broadcasters differed somewhat, the comments by noncommercial entities unanimously voiced support for some type of flexibility for NCE stations that "needed" to use an unreserved frequency to establish NCE service. The NCE Broadcasters believe that the "need-based" determination advocated in our own initial comments presents the best solution without causing undue burden on the auction process.

The "need-based" solution is fair, both going forward and for the current mutually exclusive NCE and commercial applicants for unreserved spectrum. It comports with the "fair distribution" clause of Section 307(b) of the Communications Act. It will reward the NCE applicant with a license only in circumstances of greater NCE need for the spectrum. It is based on objective standards that are easy to apply. It will not unduly burden auctions. Most importantly, it takes into account all the different kinds of circumstances by which NCE stations receive or acquire unreserved spectrum. No other proposal meets all of these criteria.

^{2/} See Comments of Jack I. Gartner at page 4.

In addition, this "need-based" approach will work without the need to impose holding periods, or other restrictions, on the alienability of a license held by an NCE station -- if the channel is awarded to an NCE applicant based on "need," the channel would be permanently reserved for NCE use.

The attached Case Studies demonstrate why some sort of "need-based" determination system is necessary for NCE stations seeking to use unreserved spectrum.

CONCLUSION

For the reasons stated above, the NCE Broadcasters file these reply comments in support of how best to decide among mutually exclusive applications that propose noncommercial educational use of spectrum.

Respectfully submitted,

ALASKA PUBLIC
TELECOMMUNICATIONS, INC.

ARIZONA BOARD OF REGENTS FOR
BENEFIT OF THE UNIVERSITY OF
ARIZONA

ARKANSAS EDUCATIONAL
TELEVISION COMMISSION

BOARD OF REGENTS OF SOUTHEAST
MISSOURI STATE UNIVERSITY

BOARD OF REGENTS OF THE
UNIVERSITY OF NEW MEXICO AND
THE BOARD OF EDUCATION OF THE
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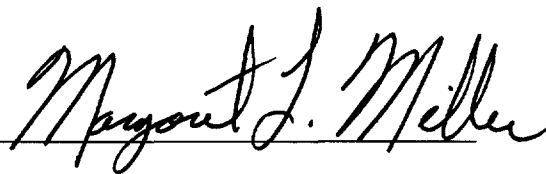
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CASE STUDIES

The NCE Broadcasters have pending several applications for nonreserved frequencies which, if subject to competitive bidding, would demonstrate the adverse public policy results from application of the Commission's proposal to auction mutually exclusive applications. For example:

A University applicant has a pending application for a new noncommercial educational FM station on a nonreserved channel. Its application is mutually exclusive with five other applications. Three of the six applicants are seeking noncommercial educational broadcast stations, as defined by Section 397(6) of the Communications Act. Each of the noncommercial educational applicants are existing broadcasters seeking to provide new noncommercial service to an area not adequately served by public radio. Currently noncommercial educational FM radio service in the area is limited due to the presence of TV Channel 6 interference and Canadian FM allocations, which preclude use of reserved band channels in the area. Use of competitive bidding to decide among the six applicants would thwart the public interest by disadvantaging the noncommercial applicants in an area needing such noncommercial educational service.

A state-owned public broadcasting network responsible for public television service throughout its state has a pending application for a new NTSC television station on a nonreserved channel that is mutually exclusive with two other applications -- one by another public (university) broadcaster and one by a commercial broadcaster. The state entity applied for the station in order to overcome possible loss of service in a major metropolitan area of the

state due to the "cliff effect" anticipated to be encountered with digital television facilities. Use of competitive bidding would thwart the public interest by disadvantaging continued public television service in a digital environment.

Another state-owned public broadcasting network responsible for public radio service throughout its state has a pending application for a new "fill-in" FM translator station on a nonreserved channel. The "fill-in" FM translator is necessary to ensure adequate reception service of its existing noncommercial educational radio station in parts of a major metropolitan area. This area is already "presumed" to receive the service, but cannot due to FM signal propagation and reception problems. This application is mutually exclusive with another "fill-in" application by a commercial broadcaster. However, under the FM translator rules in existence at the time both applications were filed, the "first to file" would have been selected. The state-owned public broadcaster was the first to file. A substantial FCC processing delay in applying the "first to file" rule has caused the nonreserved translator channel to be potentially subject to competitive bidding.

A state-owned public broadcasting network responsible for public radio service throughout its state plans to use other nonreserved band FM frequencies to fulfill its statewide plan for the provision of noncommercial educational radio service. In the area where service is needed, use of FM reserved band channels is precluded by the presence of TV Channel 6 interference and Canadian allocations. Even if a state agency would be permitted to engage to competitive bidding (which is not clear), the state agency would be disadvantaged in its quest to provide public broadcasting service to all the residents of its state if forced to compete

against for-profit entities for frequencies. This would be contrary to Section 73.502 of the FCC rules.

A public broadcaster has a pending application for a new noncommercial educational television station. KETC filed this application in conjunction with a petition for rulemaking seeking to allot a new reserved channel in lieu of a vacant reserved channel which has been rendered unusable by the Commission's proposed digital television Table of Allotments. If the Commission determined not to reserve the channel for noncommercial educational use and if mutually exclusive commercial television applications were filed for that channel, the public broadcaster would face the possibility of competing against commercial television applicants for a channel that had been originally intended for noncommercial educational use.

Several university broadcasters have TV Translator stations on Channels 60-69 which will be displaced by the recent reallocation of that spectrum or by the transition to digital television. If these entities were forced to bid against other displaced TV translator/LPTV applicants for scarce frequencies during and after DTV transition, the continued provision of public television service to these areas could be jeopardized.

These examples demonstrate that the public interest is not well served by auctioning channels when one of the applicant proposes to use the channel on a noncommercial educational basis while other applicants propose commercial uses. The Commission cannot subject these situations to competitive bidding without violating the bedrock public interest principles that have guided the Commission in deciding between competing mutually exclusive applications.